

## SENATE BILL NO. 373

INTRODUCED BY ESSMANN, STAPLETON

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LICENSING LAWS FOR PROFESSIONAL EMPLOYER ORGANIZATIONS AND GROUPS; DEFINING "FINANCIAL STATEMENTS"; REQUIRING A \$100,000 SECURITY DEPOSIT IN CERTAIN CASES; PROVIDING THAT A SECURITY BOND, A LETTER OF CREDIT, OR MARKETABLE SECURITIES DEPOSITED WITH THE DEPARTMENT MAY BE USED TO PAY CERTAIN LIABILITIES; ALLOWING FOR AFFIDAVITS BY ASSURANCE ORGANIZATIONS TO VERIFY THAT FINANCIAL REQUIREMENTS ARE MET; PROVIDING FOR PROVISIONAL LICENSING; PROVIDING THAT A CLIENT IS NOT PRECLUDED FROM PROVIDING BENEFITS TO EMPLOYEES COEMPLOYED BY A PROFESSIONAL EMPLOYER ORGANIZATION OR GROUP; AMENDING SECTIONS 39-8-102, 39-8-202, 39-8-204, 39-8-206, 39-8-207, AND 39-8-302, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 39-8-102, MCA, is amended to read:

**"39-8-102. Definitions.** As used in this chapter, unless the context indicates otherwise, the following definitions apply:

(1) "Applicant" means a person that seeks to be licensed under this chapter.

(2) "Client" means a person that obtains all or part of ~~its~~ the person's workforce from another person through a professional employer arrangement.

(3) "Controlling person" means an individual who possesses the right to direct the management or policies of a professional employer organization or group through ownership of voting securities, by contract or otherwise.

(4) "Department" means the department of labor and industry.

(5) "Employee leasing arrangement" means an arrangement by contract or otherwise under which a professional employer organization hires its own employees and assigns the employees to work for another person to staff and manage, or to assist in staffing and managing, a facility, function, project, or enterprise on an ongoing basis.

1 (6) "Financial statements" means accounting information, consisting of balance sheets and income  
2 statements, that identifies the financial position of applicants or licensees through their operations.

3 ~~(6)(7)~~ "Licensee" means a person licensed as a professional employer organization or group under this  
4 chapter.

5 ~~(7)(8)~~ "Person" means an individual, association, company, firm, partnership, corporation, or limited  
6 liability company.

7 ~~(8)(9)~~ (a) "Professional employer arrangement" means an arrangement by contract or otherwise under  
8 which:

9 (i) a professional employer organization or group assigns employees to perform services for a client;  
10 (ii) the arrangement is or is intended to be ongoing rather than temporary in nature; and  
11 (iii) the employer responsibilities are shared by the professional employer organization or group and the  
12 client.

13 (b) The term does not include:

14 (i) services performed by a temporary service contractor;  
15 (ii) arrangements under which a person shares employees with a commonly owned company within the  
16 meaning of section 414(b) and (c) of the Internal Revenue Code of 1986, as amended, if:

17 (A) that person's principal business activity is not entering into professional employer arrangements;  
18 and

19 (B) that person does not represent to the public that the person is a professional employer organization  
20 or group;

21 (iii) arrangements existing for employment of an independent contractor, as defined in 39-71-120; and

22 (iv) arrangements by a health care facility, as defined in 50-5-101, to provide its own employees to  
23 perform services at and on behalf of another health care facility or at and on behalf of a private office of  
24 physicians, dentists, or other physical or mental health care workers licensed and regulated under Title 37.

25 ~~(9)(10)~~ "Professional employer group" or "group" means at least two but not more than five professional  
26 employer organizations, each of which is majority-owned by the same person.

27 ~~(10)(11)~~ (a) "Professional employer organization" means:

28 (i) a person that provides services of employees pursuant to one or more professional employer  
29 arrangements or to one or more employee leasing arrangements; or

30 (ii) a person that represents to the public that the person provides services pursuant to a professional

1 employer arrangement.

2 (b) The term does not include a health care facility, as defined in 50-5-101, that provides its own  
3 employees to perform services at and on behalf of another health care facility or at and on behalf of a private  
4 office of physicians, dentists, or other physical or mental health care workers licensed and regulated under Title  
5 37.

6 ~~(11)~~(12) "Temporary service contractor" means a person conducting a business that hires ~~its~~ the  
7 person's own employees and assigns them to clients to fulfill a work assignment with a finite ending date to  
8 support or supplement the client's workforce in situations resulting from employee absences, skill shortages,  
9 seasonal workloads, and special assignments and projects."

10  
11 **Section 2.** Section 39-8-202, MCA, is amended to read:

12 **"39-8-202. Initial license application -- application fee -- standards -- provisional license.** (1) An  
13 applicant for initial licensure as a professional employer organization or group shall file with the department a  
14 completed application on a form provided by the department.

15 (2) The application must be accompanied by a nonrefundable application fee and any material or  
16 information required by the department that demonstrates compliance with the requirements of this chapter. The  
17 application fee is:

18 (a) \$750 for a resident or nonresident unrestricted license; and

19 (b) \$500 for a restricted license.

20 (3) As a condition of licensure under this chapter, an applicant who is not a resident or who is domiciled  
21 outside the state must first be licensed as a professional employer organization or group in the state in which  
22 the applicant is a resident or is domiciled if licensing is required by that state.

23 (4) An applicant for licensure as a professional employer organization or group ~~shall~~ must meet the  
24 following standards:

25 (a) An individual must be 18 years of age or older.

26 (b) A partnership or a limited partnership shall provide the names and home addresses of all partners,  
27 indicate whether each partner is a general or a limited partner, and include a copy of the partnership agreement  
28 or an affidavit signed by all partners acknowledging that ~~no~~ a written partnership agreement ~~exists~~ does not  
29 exist.

30 (c) A corporation shall state the names and home addresses of all officers, directors, and shareholders

1 who own a 5% or greater interest in the corporation ~~and provide a certificate of good standing from the secretary~~  
2 ~~of state demonstrating that the corporation is qualified to do business in this state.~~ A domestic or foreign  
3 corporation must have filed any required documents with the secretary of state and must remain in good  
4 standing in order to conduct business pursuant to this chapter.

5 (d) A limited liability company shall state the names and home addresses of those individuals who own  
6 a 5% or greater interest in the limited liability company ~~and provide a certificate of good standing from the~~  
7 ~~secretary of state demonstrating that the company is qualified to do business in this state.~~ A domestic or foreign  
8 limited liability company must have filed any required documents with the secretary of state and must remain  
9 in good standing in order to conduct business pursuant to this chapter.

10 (e) A group:

11 (i) must be authorized to act on behalf of the group;

12 (ii) shall include for each professional employer organization within the group the information required  
13 in subsection (4); and

14 (iii) shall guarantee, on a form provided by the department and executed by each professional employer  
15 organization within the group, payment of all financial obligations with respect to wages, payroll-related taxes,  
16 insurance premiums, and employee benefits of each other member within the group.

17 (5) An applicant shall also provide:

18 (a) the trade name or names under which the applicant conducts business, the business's taxpayer or  
19 employer identification number, the address of the business's principal place of business in the state, and the  
20 addresses of any other offices within the state through which the applicant intends to conduct business as a  
21 professional employer organization or group. If the applicant's principal place of business is located in another  
22 state, the address must be provided.

23 (b) a list by jurisdiction of each name under which the applicant has operated in the preceding 5 years,  
24 including any alternative names, names of predecessors, and names of related business entities with common  
25 majority ownership, and detailed information on the background of each controlling person to the extent required  
26 by the department; and

27 (c) other information requested by the department to show that the applicant and each controlling  
28 person are of good moral character, have business integrity, and are financially responsible. "Good moral  
29 character" means a personal history of honesty, trustworthiness, and fairness; a good reputation for fair dealings;  
30 and respect for the rights of others and for the laws of this state and nation.

(6) (a) Except for an applicant who is granted a restricted license under subsection ~~(8)~~ (9), an applicant shall maintain a tangible accounting net worth of not less than \$50,000, evidenced by:

(i) providing a financial statement statements prepared THAT HAVE BEEN INDEPENDENTLY AUDITED by a certified public accountant in accordance with generally accepted accounting principles and accompanied by a compilation report by an independent certified public accountant; or

(ii) providing independently compiled financial statements and a \$100,000 security deposit in a form that is acceptable to the department.

(b) If, after licensure, an applicant defaults in paying wages or payroll PAYROLL-RELATED taxes or in meeting any liability arising pursuant to Title 39, chapters 71 and 72, or this chapter, the security deposit may be used to meet those obligations. The security deposit may not be used in determining the net worth of an applicant.

(c) (i) Documents submitted to establish net worth must reflect net worth as of a date not more than 6 months prior to the date on which the application is submitted.

(ii) A financial statement Financial statements submitted must be attested by the president, chief financial officer, and at least one controlling person of the professional employer organization or group.

(iii) In meeting the specified If an applicant is unable to meet the \$50,000 net worth requirement, the applicant may shall provide to the department a surety bond, a letter of credit, or marketable securities acceptable to the department in an amount of not less than \$50,000 to cover the deficiency. If, after licensure, an applicant defaults in paying wages or payroll PAYROLL-RELATED taxes or in meeting any liability arising pursuant to Title 39, chapters 71 and 72, or this chapter, the surety bond, letter of credit, or marketable securities provided to the department may be used to meet those obligations. A surety will not be acceptable to satisfy this requirement unless the applicant submits sufficient evidence to satisfy the department that the surety has adequate resources to satisfy the obligations of the surety. A surety is subject to audit or verification by the department or its agent.

(7) The applicant shall maintain a positive working capital, as ~~determined in accordance with generally accepted accounting principles~~ evidenced by financial statements.

(8) The department may provide by rule for the acceptance, in lieu of the requirements of subsections (6) and (7), of an affidavit provided by a bonded, independent, and qualified assurance organization that has been approved by the department certifying the qualifications of a professional employer organization or group seeking licensure under this chapter.

1       ~~(8)~~(9) The department may issue a restricted license for limited operation within this state to a  
2 professional employer organization or group that is a resident of or domiciled in another state if:

3       (a) the applicant's state of residence or domicile provides for licensing of professional employer  
4 organizations or groups, the applicant is licensed and in good standing in ~~the~~ that state ~~of residence or domicile~~;  
5 and that state grants a similar privilege for restricted licensing to professional employer organizations or groups  
6 that are residents of or domiciled in this state and that are licensed under this chapter;

7       (b) the applicant does not maintain an office, a sales force, or a sales representative in this state and  
8 does not solicit clients who are residents of or domiciled in this state; and

9       (c) the applicant does not have more than 100 leased employees working in this state.

10       ~~(9)~~(10) An applicant for a ~~nonresident or~~ restricted license shall ~~file, on a form provided by the~~  
11 ~~department, an appointment of~~ appoint a recognized and approved entity as its ~~attorney~~ registered agent to  
12 receive service of legal process issued against it in this state.

13       (11) The department may issue a provisional license to an applicant that allows the applicant to operate  
14 in this state while the applicant's application is being processed by the department. The department may not  
15 charge a fee for a provisional license. The department may adopt rules to implement the provisions of this  
16 subsection.

17       ~~(10)~~(12) A license issued under 39-8-204 or this section ~~remains the property of the department and may~~  
18 ~~not be transferred."~~

19  
20       **Section 3.** Section 39-8-204, MCA, is amended to read:

21       **"39-8-204. License renewal.** (1) ~~Except as provided in subsection (5), a~~ A license issued under this  
22 chapter is valid for 1 year from the date of issuance unless suspended or revoked.

23       (2) An applicant for license renewal is subject to the requirements of 39-8-202(3) through (11).

24       ~~(2)~~(3) At least 30 days prior to the expiration of the license, the licensee shall submit an application for  
25 renewal of a license on a form prescribed by the department and accompanied by the license fee, as provided  
26 in 39-8-205.

27       ~~(3)~~(4) A late renewal application may not be processed prior to the expiration of the licensee's current  
28 license. A person engaged in an unlicensed activity is subject to the penalty established in 39-8-302.

29       ~~(4)~~(5) Denial of a renewal license is subject to review under the provisions of 39-8-203.

30       ~~(5) If the application fee required in 39-8-202 is paid and accepted, then no additional license fee is~~

1 ~~required for the first year."~~

2  
3 **Section 4.** Section 39-8-206, MCA, is amended to read:

4 **"39-8-206. License suspension, revocation, or nonrenewal.** (1) In addition to the penalty provided  
5 in 39-8-302, the department may suspend for up to 1 year, may permanently revoke, or may refuse to renew  
6 a license issued under this chapter if, after notice to the licensee ~~of the charges and after a hearing~~, the  
7 department finds that any of the following exists:

8 (a) a cause for which issuance of the license could have been refused had it been known to the  
9 department at the time of issuance;

10 (b) a violation of an order of the department or noncompliance with any provision of this chapter;

11 (c) procurement of or attempting to procure a license through misrepresentation or fraud;

12 (d) failure to provide a written response to a written inquiry from the department or its agent within 30  
13 days after receiving an inquiry; or

14 (e) failure to meet or maintain any other requirement of this chapter.

15 (2) If a license is suspended, revoked, or not renewed, the department shall:

16 (a) immediately notify by certified mail the licensee and the licensee's workers' compensation carrier;  
17 and

18 (b) require the licensee to:

19 (i) notify each client by certified mail, return receipt requested, of the suspension, revocation, or  
20 nonrenewal using language furnished by the department;

21 (ii) notify each client in writing that the client shares joint and several liability, retroactive to the date of  
22 the client's entering into a contract with the licensee, for any wages, workers' compensation premiums,  
23 payroll-related taxes, and any benefits left unpaid by the professional employer organization or group; and

24 (iii) provide the department with evidence of client notification.

25 (3) Upon notification, the licensee may appeal the decision of the department pursuant to the procedure  
26 provided in 39-8-203."

27  
28 **Section 5.** Section 39-8-207, MCA, is amended to read:

29 **"39-8-207. Requirements of licensee.** (1) A professional employer organization or group shall, by  
30 written contract with the client, establish the responsibilities and duties of each party. The contract must disclose

1 to the client:

2 (a) the services provided, the administrative fee, and the respective rights and obligations of the parties;

3 (b) a statement providing that the professional employer organization or group:

4 (i) reserves a right of direction and control over employees assigned to the client's location. The client  
5 may retain sufficient direction and control over employees necessary to conduct business and without which the  
6 client would be unable to conduct business, discharge fiduciary responsibilities, or comply with state licensing  
7 laws.

8 (ii) assumes responsibility for the payment of wages of employees, workers' compensation premiums,  
9 payroll-related taxes, and employee benefits from its own accounts without regard to payments by the client; and

10 (iii) retains authority to hire, terminate, discipline, and reassign employees. The client has the right to  
11 accept or cancel the assignment of an employee.

12 (c) a statement that, with respect to a worker supplied to a client by a professional employer  
13 organization or group, the client shares joint and several liability for any wages, workers' compensation  
14 premiums, and payroll-related taxes and for any benefits left unpaid by the professional employer organization  
15 or group and that, in the event that the licensee's license is suspended or revoked, this liability is retroactive to  
16 the client's entering into a contract with the licensee; and

17 (d) a statement that the client is responsible for compliance with the Montana Safety Culture Act, Title  
18 39, chapter 71, part 15.

19 (2) The professional employer organization or group shall:

20 (a) give written notice of the general nature of the relationship between the professional employer  
21 organization or group and the client to each employee assigned to perform services at the client's place of work.  
22 The disclosure must provide that the professional employer organization:

23 (i) reserves a right of direction and control over employees assigned to the client's location. The client  
24 may retain sufficient direction and control over employees necessary to conduct business and without which the  
25 client would be unable to conduct business, discharge fiduciary responsibilities, or comply with state licensing  
26 laws.

27 (ii) retains authority to hire, terminate, discipline, and reassign employees. The client has the right to  
28 accept or cancel the assignment of an employee.

29 (b) submit to the department, within 90 days of the end of each calendar quarter, information certified  
30 by an independent certified public accountant demonstrating that all payroll-related taxes for the quarter have



1 been paid. Upon a showing of reasonable cause, one 30-day extension may be granted for each quarter.

2 (c) maintain and make available for the department or its agent all records relating to the licensee's  
3 business conduct. Records must be maintained for 5 years after terminating an employee leasing arrangement  
4 or professional employer arrangement.

5 (d) notify the department in writing within 20 days of a change of business address or a change in  
6 partners, directors, officers, members, or controlling persons designated in the license;

7 (e) notify the department in writing within 20 days after a client either commences or terminates a  
8 professional employer arrangement or an employee leasing arrangement with that professional employer  
9 organization or group; and

10 (f) post the license issued in a conspicuous place in the principal place of business and display, in clear  
11 public view in each licensee's office, a notice stating that the professional employer organization or group is  
12 licensed and regulated by the department.

13 (3) When a professional employer organization or group uses a professional employer arrangement  
14 with the client, both the professional employer organization or group and the client are the immediate employers  
15 of the workers subject to the arrangement for the purposes of the workers' compensation laws of this state.  
16 When a professional employer organization or group uses an employee leasing arrangement with the client, the  
17 professional employer organization or group is the immediate employer of the workers subject to the  
18 arrangement for the purposes of the workers' compensation laws of this state.

19 (4) A professional employer organization or group shall:

20 (a) pay wages and collect, report, and pay payroll-related taxes from its own accounts;

21 (b) pay unemployment taxes, pursuant to 39-51-1103, and provide, maintain, and secure all records  
22 and documents required of employers under the unemployment insurance laws of this state. For unemployment  
23 reporting purposes, each professional employer organization is the employing unit, as defined in 39-51-201, and  
24 shall keep separate records and submit quarterly wage lists for each of its clients.

25 (c) provide workers' compensation coverage for all employees and provide, maintain, and secure all  
26 records and documents required of employers under the workers' compensation laws of this state. A license may  
27 not be issued to a professional employer organization or group until the department receives proof of workers'  
28 compensation coverage for all employees assigned to any client location in this state.

29 (5) A professional employer organization or group is ~~the~~ an employer for sponsoring and maintaining  
30 employee benefit and welfare plans. The plans, if limited to employees of the professional employer organization

1 or group, are not multiple employer welfare arrangements. This section does not preclude the client from  
2 providing benefits to employees coemployed by a professional organization or group.

3 (6) A professional employer organization or group shall disclose to the department, to each client, and  
4 to its employees information on any health or life fringe benefit program provided for its employees. The  
5 information must include:

6 (a) the type of benefits;

7 (b) the identity of each insurer providing each type of coverage;

8 (c) the amount of benefits for each type of coverage and to whom or on whose behalf the benefits will  
9 be paid;

10 (d) the policy limits on each insurance policy; and

11 (e) whether coverage is fully insured, partially insured, or fully self-funded.

12 (7) Disclosure required by this section may be made by any written means reasonably calculated to  
13 adequately inform the employees, including a summary plan description that meets the requirements of the  
14 Employee Retirement Income Security Act of 1974, {29 U.S.C. 1001, et seq.}, as amended.

15 (8) (a) Subject to any contrary provisions of the contract between the client and the professional  
16 employer organization or group, the professional employer arrangement that exists between the parties must  
17 be interpreted for purposes of insurance, bonding, and employer liability pursuant to subsection (8)(b).

18 (b) The professional employer organization or group:

19 (i) is entitled, along with the client, to the exclusivity of the remedy under both the workers'  
20 compensation and employers' liability provisions of a workers' compensation policy or plan of either party; and

21 (ii) is not liable for the acts, errors, or omissions of a client or of an employee acting under the direction  
22 and control of a client, subject to the provisions of this chapter. Subject to the provisions of this chapter, a client  
23 is not liable for the acts, errors, or omissions of a professional employer organization or group or of any  
24 employee of a professional employer organization or group acting under the direction and control of the  
25 professional employer organization or group.

26 (9) A professional employer organization that applies for workers' compensation coverage shall also  
27 maintain and furnish to the insurer sufficient information to permit the calculation of an experience modification  
28 factor for each client employer, including but not limited to:

29 (a) the client employer's corporate or business name;

30 (b) the client employer's taxpayer or employer identification number;

1 (c) the client employer's risk identification number;

2 (d) a listing of all employees assigned to each client employer and the applicable classification code  
3 and payroll; and

4 (e) the client employer's first report of injury identifying the client employer and any other information  
5 necessary to permit the calculation of an experience modification factor for each client employer.

6 (10) An employee assigned to a client by a professional employer organization or group is considered  
7 the employee of the client for purposes of general liability insurance, motor vehicle insurance, fidelity bonds,  
8 surety bonds, and liquor liability insurance carried by the client. An employee assigned to a client by a  
9 professional employer organization or group is not an employee of the professional employer organization or  
10 group for purposes of general liability insurance, motor vehicle insurance, fidelity bonds, surety bonds, or liquor  
11 liability insurance carried by the professional employer organization or group unless the employee is included  
12 by reference in an employment arrangement contract, insurance contract, or bond.

13 (11) The sale of professional employer services pursuant to this chapter does not constitute the sale of  
14 insurance under Title 33 unless the professional employer organization or group:

15 (a) undertakes to indemnify another or pay or provide a specified or determinable amount of benefit  
16 based on determinable contingencies unless done through a licensed insurer or an employee welfare benefit  
17 plan as defined in 29 U.S.C. 1002(1);

18 (b) solicits, negotiates, effects, procures, delivers, renews, continues, or binds an insurance policy  
19 unless done through a licensed insurance producer; or

20 (c) is not exempt under 33-17-103(4).

21 (12) A sole proprietor or a working member of a partnership working under a professional employer  
22 arrangement may not receive unemployment insurance benefits unless the individual would otherwise be entitled  
23 to benefits if the professional employer arrangement did not exist.

24 (13) If the professional employer organization or group or the client complies with the provisions of  
25 39-71-401 with respect to a worker under the professional employer arrangement, the professional employer  
26 organization or group and the client, with respect to those workers, are not uninsured employers, as defined in  
27 39-71-501, and are not subject to the provisions of 39-71-508 or 39-71-515."

28  
29 **Section 6.** Section 39-8-302, MCA, is amended to read:

30 **"39-8-302. Disciplinary action against licensee -- penalties.** (1) The department may deny a license

1 application or may suspend, revoke, or refuse to renew an existing license for a person who:  
2 (a) obtains or renews a license through bribery, fraud, or willful misrepresentation;  
3 (b) engages in fraud, deceit, misrepresentation, or misconduct in:  
4 (i) obtaining or providing workers' compensation or health coverage;  
5 (ii) the classification of employees;  
6 (iii) the reporting of employee wages for purposes of ~~unemployment insurance~~ any payroll  
7 PAYROLL-RELATED taxes or workers' compensation benefits; or  
8 (iv) the operation of a professional employer organization or group;  
9 (c) conducts business without a valid license;  
10 (d) fails to maintain evidence of workers' compensation insurance coverage;  
11 (e) transfers or attempts to transfer a license issued pursuant to this chapter; or  
12 (f) violates the provisions of this chapter or a rule issued pursuant to this chapter.  
13 (2) A person who fails to comply with the provisions of this chapter is guilty of a misdemeanor and, upon  
14 conviction, is subject to a fine of up to \$1,000, imprisonment for not more than 1 year, or both."

15  
16 NEW SECTION. **Section 7. Effective date.** [This act] is effective on passage and approval.

17 - END -